

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 28 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0264-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LEROY GILBERT,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400485

Honorable Thomas E. Collins, Judge

REVIEW GRANTED; RELIEF DENIED

Gail Gianasi Natale

Phoenix
Attorney for Petitioner

H O W A R D, Presiding Judge.

¶1 Petitioner Leroy Gilbert pled guilty to attempted molestation of a child, a class three felony. In December 2004, the trial court sentenced him to five years' imprisonment, the minimum prison term available, although Gilbert was also eligible to have his sentence suspended and to be placed on probation. In a petition for post-conviction relief filed

pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., then 78-year-old Gilbert argued his “failing health” constituted newly discovered evidence the trial court had not considered at sentencing and that trial counsel had been ineffective in failing to fully present health-related information and argue it as a mitigating factor. The trial court found “[t]he list of medical conditions” Gilbert had provided in support of his petition did not constitute newly discovered evidence and that, at sentencing, the court had considered Gilbert’s advanced age, his use of oxygen, and “his health . . . as set forth in the presentence memorandum.” The trial court also rejected Gilbert’s ineffective assistance of counsel claim, finding “[c]ounsel’s failure to present additional medical facts d[id] not create a reasonable possibility that the resulting sentence would have been different.” Based on these findings, the court denied Gilbert’s petition for post-conviction relief. Gilbert has filed this petition for review from that ruling. We grant review, but deny relief.

¶2 We will not disturb a trial court’s denial of post-conviction relief unless the trial court clearly abused its discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). We find no such abuse in the trial court’s finding that the medical conditions Gilbert belatedly brought to its attention did not constitute newly discovered material facts establishing a ground for relief. To avoid dismissal of a post-conviction petition on an allegation of newly discovered facts, a defendant must present a colorable claim, meaning one that, if true, would have changed the outcome. *State v. Cooper*, 166 Ariz. 126, 129, 800 P.2d 992, 995 (App. 1990). To state a colorable claim of newly discovered evidence,

a defendant must show, inter alia, not only that material facts were discovered after trial, but also that “[t]he defendant exercised due diligence in securing” those facts. Ariz. R. Crim. P. 32.1(e)(2).

¶3 In his petition for post-conviction relief, Gilbert stated: “This evidence could have been discovered with due diligence.” By definition, such evidence does not establish a colorable claim of newly discovered material facts. Moreover, the trial court was, in fact, told about many of the health problems Gilbert appears to have had. Information was available to the court at the time of sentencing showing that Gilbert had prostate “health problems;” that he also suffered from allergies, restless leg syndrome, and a variety of cardiovascular or cardiopulmonary problems described as “high blood pressure,” “congestive heart failure,” “diastolic dysfunction”; and that continuous oxygen had been prescribed for him in August 2004. Among those conditions not specifically mentioned either at sentencing, in the presentence report, or in Gilbert’s own sentencing memorandum were mild macular degeneration, coronary artery disease requiring placement of a stent, recurrent chest pain, high cholesterol, pain from arthritis in his right knee, an artificial left knee implanted in 2000, chronic obstructive lung disease (for which oxygen and inhalers were provided), prostate cancer that had been treated in 1999, and skin cancer. According to a footnote in Gilbert’s petition for review, “[a]ll but [his] recently-diagnosed skin cancer existed when the trial court sentenced him to prison in December 2004.” However, a summary review of his medical records appended to the post-conviction petition shows skin

cancer was included among Gilbert’s “many chronic and recurring health problems.” The records also suggested he had experienced some skin cancer in 2002 and 2003. Accordingly, it appears all of the conditions either could have been discovered with due diligence or did not exist at the time of sentencing; none, therefore, constitutes a newly discovered material fact under Rule 32.1(e).

¶4 This significantly distinguishes Gilbert’s case from both *Cooper* and *State v. Ellevan*, 179 Ariz. 382, 880 P.2d 139 (App. 1994). In both those cases, the petitioner showed he had been diagnosed after sentencing with human immunodeficiency virus (HIV) and had been *unaware at the time of sentencing* he was infected with the virus.¹ *Ellevan*, 179 Ariz. at 383, 880 P.2d at 140; *Cooper*, 166 Ariz. at 128, 800 P.2d at 994. In contrast, Gilbert neither showed, nor even alleged, he had been unaware of any of the medical conditions that existed at the time of sentencing. The trial court therefore did not err in implicitly finding Gilbert had failed to state a colorable claim of newly discovered evidence.

¶5 Nor did the court abuse its discretion in finding Gilbert had failed to show counsel had been ineffective. To state a colorable claim of ineffective assistance of counsel, a defendant must establish counsel’s performance fell below prevailing professional norms and the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). A defendant is not entitled to relief if he or she fails to

¹In *Cooper*, the defendant had failed to show in his petition for post-conviction relief that he had actually been infected with HIV at the time of sentencing; that issue was left for determination at an evidentiary hearing. 166 Ariz. at 131, 800 P.2d at 997.

show either of these elements. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 Here, even assuming without deciding that counsel’s failure to present additional evidence about Gilbert’s health to the trial court fell below the requisite threshold, Gilbert failed to show the absence of that information prejudiced him. First, as previously discussed, the court was aware of Gilbert’s advanced age and a substantial number of his medical issues at the time of sentencing. Second, and perhaps more significantly, the court found probation was not appropriate based upon the nature of the offense and the relationship between Gilbert and the victim. In so finding, the court referred to the victim (Gilbert’s granddaughter) and her family, stating it had “seldom seen a trauma to a whole family unit [as was] presented here. The whole family is the victim in this case and it’s had a terribl[e] effect on so many people that the court finds that probation is not appropriate.” Finally, having found probation inappropriate, the court imposed the minimum prison term available. Accordingly, counsel’s presentation of the additional facts could not have resulted in a more mitigated sentence.

¶7 Again, the facts present in *Ellevan* are distinguishable. In *Ellevan*, the appellate court stated a defendant’s post-sentencing diagnosis of HIV was “material to . . . sentencing because [HIV] can transform into a life sentence a term of years that would otherwise end well within the recipient’s probable life span.” 179 Ariz. at 383, 880 P.2d at 140, *citing Cooper*, 166 Ariz. at 130, 800 P.2d at 996. Not only did Gilbert’s awareness

of the medical circumstances pre-date his sentencing, but he presented no evidence that the conditions themselves were likely to have had a comparably dramatic impact on the trial court's exercise of its sentencing discretion. In addition, nothing about the additional medical evidence would have changed the factors upon which the court had determined probation was inappropriate.

¶8 Under all the circumstances, we cannot find the trial court abused its discretion in finding counsel's failure to present additional evidence did not affect the sentencing outcome. We grant Gilbert's petition for review but deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge